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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BIKRAM CHOUDHURY, Plaintiff and Appellant, v. LANCASTER REALTY HOLDINGS, Defendant and Respondent.	B209443 (Consolidated with B210967) (Los Angeles County Super. Ct. No. SC093939)

APPEALS from a judgment and order of the Los Angeles County Superior Court, John L. Segal, Judge. Judgment and order affirmed.

Robert M. Ungar for Plaintiff and Appellant.

The Guerrini Law Firm, John D. Guerrini and David Brand for Defendant and Respondent.

Appellant Bikram Choudhury (Bikram) appeals that portion of the trial court's ruling which entitled respondent Lancaster Realty Holding (Lancaster) to retain rent due in the amount of $21,000 from the security deposit under a commercial lease agreement. Also, by way of a separate appeal, Bikram appeals the trial court's ruling denying his motion for attorney fees under Civil Code section 1717. On February 3, 2009, this court ordered consolidation of the appeals. For the reasons hereafter given, we affirm.

We conclude the trial court did not err in finding rent was owed for April 2007 because the tenancy and Bikram's obligation to pay rent continued into April 2007. Also, we will not disturb the trial court's finding neither party was the prevailing party and its denial of attorney fees.

FACTUAL AND PROCEDURAL SUMMARY

The Lease

In July 2002, Bikram (as tenant) and Sloan Capital Partners (as landlord) entered into a fixed term commercial lease for property located at 1868 LaCienega Boulevard in Los Angeles. Sloan Capital Partners subsequently assigned its interest in the lease to Lancaster. The lease permitted use of the property by Bikram as a yoga studio. Base rent was $8,600 per month and required a security deposit of $18,000. The term of the lease was for 44 months commencing on July 15, 2002, and ending on March 15, 2006. During the tenancy Bikram made various alterations to the property including the installation of shower stalls, steam rooms, a locker room, a mezzanine, and a wall in the parking lot. In addition, Bikram connected 1868 LaCienega with 1862 LaCienega, an adjacent property which Bikram also occupied, by making an opening in the wall. These improvements ultimately led to health and safety citations from the City of Los Angeles. Bikram continued to occupy the premises beyond the March 15, 2006, date.

The Lease Amendment

On September 1, 2006, Bikram and Lancaster entered into a written settlement agreement and second amendment to the lease. The settlement agreement (1)

acknowledged that Bikram was a holdover tenant from March 15, 2006, to August 31, 2006, (2) extended the term of Bikram's tenancy to January 31, 2007, (3) amended the base rent to $14,000 per month, (4) required Bikram to correct all notices of correction and citations issued by the City, and (5) increased the amount of the security deposit by $100,000 (from $18,000 to $118,000). The parties agreed the increased security deposit was to protect Lancaster from damage done to the premises.

Bikram did not vacate the premises on January 31, 2007. Instead, Bikram paid $14,000 for rent on February 1, 2007. However, pursuant to the holdover provision in paragraph 26 of the lease, Bikram was required to pay rent at the increased rate of 150 percent or $21,000 per month.[1] Bikram paid an additional $7,000 by check dated February 12, 2007.

The Unlawful Detainer Action

On February 20, 2007, Lancaster filed an unlawful detainer action based on a three-day notice to quit against Bikram alleging the lease was a written fixed term lease and demanded possession because of expiration of the fixed term lease. Bikram filed a motion for summary judgment in the unlawful detainer action arguing he was still a tenant pursuant to paragraph 26 of the lease paying rent at 150 percent ($21,000 per month) and that a 30-day notice (not a 3-day notice) was required under the lease. Lancaster thereafter dismissed the unlawful detainer action without prejudice.

On February 21, 2007, Bikram served upon Lancaster a 30-day notice of termination of the tenancy. The notice stated: "As previously advised, this will serve as

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[1] The original July 2002 lease provided that Bikram had no right to holdover but if he did holdover "with the express or implied consent of the landlord," the tenancy will be deemed to be a month-to-month tenancy subject to every other term, condition, and covenant in the lease and required Bikram to pay 150 percent of the monthly base rent at the time.

formal notice that I am terminating my month-to-month tenancy. This is intended as a thirty (30) day notice for the purpose of terminating my tenancy in accordance with California Civil Code section 1946."

On or about March 1, 2007, Bikram again paid and Lancaster accepted $21,000 as holdover rent for March 2007. On March 7, 2007, Lancaster's counsel notified Bikram that all interior tenant improvements needed to be demolished and removed and the space left a shell upon vacation of the premises. Counsel for Bikram responded the same day noting demolition work was in progress, asking for a rent accounting and reconciliation and further stated "Please call me if you want to discuss any of these matters or the demolition work in progress. We needed to know today about the bathroom, tile, etc. but did not hear back from you."

Delivery of the Premises to Landlord

The parties disputed when Bikram actually vacated the premises and Lancaster recovered possession. Bikram contends he vacated on March 23, 2007. Counsel for Bikram stated in a letter dated March 23, 2007, "I understand the demolition work has been completed and Lessee Owned Alternations and Utility Installations have been removed. The opening with the 1862 Building has been repaired and closed and the parking lot wall has been reconstructed. The work was performed by Goal Construction, the same licensed general building contractor previously approved by your client [Lancaster]. LADBS permits and inspection records will be forwarded to your office upon my receipt. Accordingly, my client [Bikram] is vacating the premises as of midnight tonight. Your client [Lancaster] may pick up the keys tomorrow morning at the front counter of Bikram's Yoga College of India (the 1862 building). [¶] I understand a LADBS inspector has scheduled Tuesday morning at 8:00 A.M. for final inspection and approval of the repaired and closed wall with the 1862 Building. Please request your client's cooperation by permitting access to the inspector and my client's representative for the purpose of obtaining this final inspection and approval." Bikram claims to have left the premises an empty shell.

Lancaster admits the keys were turned over on or about April 2, 2007, but contends Bikram did not vacate the premises until May 2007 because the premises were not fit for renting and contractors for Bikram continued to work at the premises well into May 2007. On May 1, 2007, counsel for Lancaster acknowledged the lease required a return of any unused portion of the security deposit after Bikram vacated the premises and stated "but provides no specific time frame for such return." The letter also gave Bikram notice of the failure to surrender possession in accordance with the terms of the lease, that is – in good operating order, condition and state of repair – and the obligation to cure all items addressed in the correction notices. Additionally, the letter states, "Lancaster has been unable to rent the Premises for the entire month of April" but goes on to note "if Bikram's licensed contractor is able to complete repairs at Bikram's cost, pursuant to appropriately approved plans and permits, then an additional portion of the security deposit may be returned."

On May 17, 2007, Bikram filed its complaint for declaratory relief demanding a return of its security deposit or any portion thereof. On June 22, 2007, Lancaster refunded $33,598.39 of the security deposit and retained $84,401.61. The following deductions were made from the $118,000 security deposit:

$48,950 for repairs;

$7,000 as unpaid rent for February 2007;

$21,000 as holdover rent for April 2007;

$7,451.61 for holdover rent from May 1-11, 2007.

After a two-day bench trial commencing May 9, 2008, the trial court found Lancaster recovered possession of the premises in early April 2007. The court explained in its statement of decision "Receipt of possession usually involves delivering keys, physically vacating the premises, and manifesting an intention not to return. The evidence shows that these events occurred in the first week of April 2007." As a result, the court found Lancaster was entitled to retain $21,000 for Bikram's default in payment of rent for April 2007 and $48,950 for repair costs (for a total of $69,950). The court also

concluded Lancaster was not entitled to retain $7,451.61 as holdover rent for May 2007 (since that was future rent damages that Lancaster could recover in a separate action thereafter under Civil Code section 1951.2); nor was Lancaster entitled to retain $7,000 for February 2007 rent since the evidence showed that Bikram did pay that amount in February. Therefore, because Lancaster actually retained $84,401.61, Lancaster was ordered to return to Bikram $14,451.61 of the security deposit.

In July 2008, each of the parties filed motions for attorney fees. The trial court heard oral arguments on August 8, 2008, and then denied both parties' request for attorney fees having found neither party was the prevailing party in the declaratory relief action.

Bikram filed timely notices of appeal. On appeal of the declaratory judgment, Bikram argues the trial court erred in deducting $21,000 as holdover rent for April 2007 because (1) Bikram vacated the premises prior to April 1, 2007; (2) all rent had been paid; (3) the $21,000 was neither "rent" nor the reasonable value of the premises; and (4) the $21,000 was not "loss of rent" damages attributable to Bikram's breach of the settlement agreement. Bikram also appeals the order denying him attorney fees as the prevailing party. He contends this issue should be reconsidered by the trial court if we find the April 2007 holdover rent was not a legitimate deduction from the security deposit. For the reasons stated below, we find the trial court did not err in finding Bikram had an obligation to pay rent in April 2007. Also, we affirm the order denying either party prevailing party status for recovery of attorney fees.

DISCUSSION

Standard of Review

The trial court's judgment and statement of decision in this case contain both findings of fact and conclusions of law. We review the trial court's findings of fact to determine whether they are supported by substantial evidence. (*Foreman & Clark Corp.*

v. Fallon (1971) 3 Cal.3d 875, 881.) To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo. (*Jongepier v. Lopez* (1983) 142 Cal.App.3d 535, 538.)

The tenancy terminated in early April 2007

Appellant contends the court erred in deducting the April 2007 holdover rent in the amount of $21,000 from the security deposit because it had vacated the premises *prior* to April 1, 2007. Lancaster counters that Bikram remained in physical possession of the premises into April 2007 and Bikram remained at the request and with the consent of Lancaster in order to perform the terms of the rental agreement requiring him to repair code violations he created. Specifically Lancaster states "Although Appellant sent a notice of intent to terminate on February 21, 2007, he did not physically vacate the premises until May, 2007, and he did not turn over the keys to the premises until on or about April 2, 2007. But the premises were still not fit for renting, and Appellant attempted to complete the re-construction work. Ultimately, though Appellant never did manage to make the premises suitable for renting, his contractors continued to work at the premises well into May, 2007."

We agree with the trial court's finding that Lancaster received possession of the premises in early April 2007. That finding was supported by substantial evidence. Namely, the evidence at trial indicated even though Bikram sent Lancaster a 30-day notice of intent to terminate in February 2007, keys to the premises were not returned to Lancaster until April 2007 and Bikram was still making efforts at that time to restore the premises to the condition promised. The evidence at trial also showed that Bikram's contractors were on the premises doing construction work to repair the damages in April 2007. Lancaster argued it did not receive possession until June 2007 (the date repairs were completed), but the trial court found, and we agree, "[r]eceipt of possession usually involves delivering keys, physically vacating the premises, and manifesting an intention not to return. The evidence shows that these events occurred in the first week of April

2007." As a result, because Bikram continued in possession of the premises into April 2007 the obligation to pay rent also continued.

Bikram failed to argue in the trial court or on appeal (except indirectly in reply to this court's questions at the time of oral argument) that rent for April should have been prorated even though a provision in the lease allowed for proration. It is apparent proration was used for the rent claimed for May – that is all parties were on notice that a part of the month's rent would be due if possession was for a part of the month. Nonetheless, while proration would have been appropriate had it been sought, we conclude that claim has been forfeited because it was not properly raised in the trial court or on appeal.[2] Hence, we conclude the trial court did not err in deducting rent due for the month of April 2007.

Attorney fees

Both parties sought attorney fees in the underlying declaratory relief action. In exercising its discretion to deny attorney fees for either side, the trial court relied on *Hsu v. Abbara* (1995) 9 Cal.4th 863 and held "'If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.'" (*Id.* at p. 865.)

On appeal, Bikram contends if the judgment is reversed and remanded then the order denying him prevailing party status should also be reversed and remanded. However, we affirm the trial court's ruling. In reaching its decision, the trial court carefully weighed opposing claims. The court found the results of this case were mixed

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[2] "A party who fails to raise an issue in the trial court therefore waived the right to do so on appeal." (*In re Marriage of King* (2000) 80 Cal.App.4th 92, 117.) However, this does not preclude recovery if there is a further trial for *damages*.

for both sides and there was not a clear win by either side. We find the trial court's analysis reasonable and well within its discretion.

DISPOSITION

The judgment and order are affirmed. Each side to bear its own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**